11-22-04

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

---- In the Matter of ----	)	
	)	
PUBLIC UTILITIES COMMISSION	)	DOCKET NO. 03-0371
	)	
Instituting a Proceeding to Investigate Distributed Generation in Hawaii	)	
	)	

RESPONSE OF HAWAII RENEWABLE ENERGY ALLIANCE

TO

REBUTTAL INFORMATION REQUESTS FROM HECO/HELCO/MECO

ON

HREA'S RT-1 (WARREN S. BOLLMEIER II) REBUTTAL TESTIMONY

AND

CERTIFICATE OF SERVICE

Warren S. Bollmeier II, President
HREA
46-040 Konane Place #3816
Kaneohe HI 96744

(808) 247-7753

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

---- In the Matter of ----	)	
	)	
PUBLIC UTILITIES COMMISSION	)	DOCKET NO. 03-0371
	)	
Instituting a Proceeding to Investigate Distributed Generation in Hawaii	)	
	)	

The Hawaii Renewable Energy Alliance (HREA) hereby submits its response, which is dated and submitted to the Public Utilities Commission (PUC) on November 22, 2004 in accordance with the PUC's Prehearing Order Number 20922 (Reference Docket No. 03-0371), to Rebuttal Information Requests (RIRs) from HECO/HELCO/MECO (the "Companies") on HREA's RT-1 Rebuttal Testimony (Warren S. Bollmeier II),

I. INTRODUCTION

HREA received 11 RIRs from the Companies. HREA's response, prepared by its President (Warren S. Bollmeier II), is included in Section II.

Please note that the RIR format is as received from the Companies.

II. RESPONSE TO INFORMATION REQUESTS FROM THE VARIOUS PARTIES

HECO/HREA-RT-RIR-1 Ref: HREA-RT-1, page 15, lines 10-22

a. Please provide a copy of the source or analysis used to develop the assumption of 75% average capacity factor for CHP units.

HREA Response: The source of this information is personal communications, which are confidential.

b. Please provide a copy of the source or analysis used to develop the assumption of $2,000/kW average system installation cost.

HREA Response: The source of this information is personal communications, which are confidential.

c. Please provide a copy of the source or analysis used to develop the assumption of 5% to 8% interest rates.

HREA Response: Mr. Bollmeier used this range of interest rates to illustrate the impact of interest rates on utility costs, and considers the range to be realistic. However, if the Companies wish to suggest another range, Mr. Bollmeier would be happy to update his analysis and provide the results.

d. Please provide a copy of the source or analysis used to develop the assumption of an average heat rate of 9,300 Btu/kWh.

HREA Response: The source of this information is personal communications, which are confidential.

e. Please provide a copy of the source or analysis used to develop the assumption of 128,000 Btu to 140,000 Btu energy content in a gallon of diesel fuel.

HREA Response: The source of this information is personal communications, which are confidential.

f. Please provide a copy of the source or analysis used to develop the assumption of $1.00/gal to $1.25/gal of diesel fuel.

HREA Response: Mr. Bollmeier used this range of diesel fuel prices to illustrate the impact of fuel costs on utility's operating costs. Mr. Bollmeier believes the price range of $1.00 to $1.25 per gallon of diesel fuel is in the "ballpark," but found in his investigation that

the actual prices appear to be a "well kept secret." Thus, if the Companies wish to suggest a more appropriate range, Mr. Bollmeier would be happy to update his analysis and provide the results.

HECO/HREA-RT-RIR-2 Ref: HREA-RT-1, page 19, lines 13-14

a. Please provide your calculations that support your statement: "There would be no revenue losses to the public utility..."

HREA Response: First, Mr. Bollmeier would like to modify the statement referred to above. As written the statement reads: "There would be no revenue losses to the public utility; hence, no potential impacts to the rate base." The statement should read: "There could be revenue losses to the public utility in Case 1, but there should be no negative impacts to the rate base due to third party investments."

b. Does this statement continue to hold true if CHP investments by third parties exceed load growth?

HREA Response: Given the statement as revised in Mr. Bollmeier's response above in part "a," there could be revenue losses, as described in Case 2 (lines 19 to 26 on page 19, of Mr. Bollmeier's RT-1 Testimony).

HECO/HREA-RT-RIR-3 Ref: HREA-RT-1, page 19, lines 19-26

Provide all workpapers showing the calculations and assumptions supporting the estimated potential revenue loss between $15.8M to $18.8M/yr.

HREA Response: The Companies already have the "workpaper." It is Exhibit E.

HECO/HREA-RT-RIR-4 Ref: HREA-RT-1, page 6, lines 5-8

HREA states that DG serving the system as a whole should be considered as "export of power to a public utility by a Qualified Facility (QF)." Does HREA believe that a QF exporting power to the utility is the only case where DG serves the utility system as a whole?

HREA Response: No. For example, a utility-owned DG could serve the system as a whole, such as at a sub-station.

HECO/HREA-RT-RIR-5 Ref: HREA-RT-1, page 6, lines 18-25
Does HREA believe there is such a thing as "Utility Services", and if so, what is its definition?

HREA Response: Yes, there are "utility services." Utility services include conventional central plant generation, transmission, ancillary and other services provided by the public utility in the course of delivering electricity to its customers, holding out the services to the public for all comers to use, and using the utility's franchised powers.

HECO/HREA-RT-RIR-6 Ref: HREA-RT-1, page 7, lines 3-4
Please clarify whether HREA is taking the position that all forms and applications of DG are "utility-related non-utility services."

HREA Response: HREA does not consider all forms and applications of DG to be "utility-related non-utility services." HREA's position is as described on page 5 (line 20) to page 6 (line 25).

HECO/HREA-RT-RIR-7 Ref: HREA-RT-1-C, page 3
According to the Exhibit, the cogeneration facility is not subject to regulation by the Louisiana Public Service Commission for a number of reasons including the following:

- **a. The cogeneration facility is jointly owned by PPG and Entergy, with each having fifty percent equity interest.**
- **b. PPG will use its electric capacity on-site or will sell it in the wholesale power market.**
- **c. Entergy will sell its power to a wholesale power marketer.**
- **d. Entergy is a non-regulated company.**
- **e. Entergy is an indirect owner of the cogeneration facility.**
- **f. No owner is primarily engaged in the generation, transmission, distribution and/or sale of electricity.**
- **g. No retail electric service will be provided by the facility.**
- **h. No utilities or ratepayers will become obligated for any of the costs associated with the facility.**

Considering these aspects, please explain how this determination sets a "precedent" for HECO's proposed utility-owned CHP Program?

HREA Response: The Louisiana cogeneration facility is a large CHP, similar in concept and application as we could have in Hawaii, where a portion of the power is consumed on site and

the residual sold wholesale (as a QF) to a public utility. The Companies have described the facts (items a. to h. above), which describe the Louisiana facility and its proposed operation, but are not the reasons for the Louisiana Public Service Commission (PSC) decision. In essence, the Louisiana PSC determined that this cogeneration facility was not a public utility and therefore not subject to regulation. Thus, HREA believes the Louisiana PSC decision supports the framework in which a regulated electric utility does NOT provide both regulated and unregulated services, unless via a unregulated affiliate, which is the case in the Louisiana cogeneration facility. HREA supports this approach as a precedent for how similar facilities, as in HECO's proposed utility-owned CHP Program, should be treated in Hawaii. Specifically, utilities are not supposed to own facilities beyond their meters that do not serve their entire system, because doing so is a non-utility function.

HECO/HREA-RT-RIR-8 Ref: HREA-RT-1, page 11, lines 1-2

PEI Power's original project structure, wherein PEI would not have controlled and restricted the members of the class of people who could demand service, caused concerns that PEI would be functioning as a public utility.

a. **Is it HREA's position that for a public utility to provide a service, it should not control and restrict the members of the class of people who could demand such service?**

HREA Response: This question is not relevant, as HREA does not support the public utility providing this type of service, which was determined under PA law to be a private utility service.

b. **Does HREA believe that HECO is proposing to control and restrict the members of the class of people who could demand CHP service?**

HREA Response: HREA has no opinion or response to this question.

c. **If the answer to subpart b. is yes, please explain in detail.**

HREA Response: None required.

HECO/HREA-RT-RIR-9 Ref: HREA-RT-1, Exhibit RT-1-E

a. Did HREA's analysis take into account the benefits from revenues from the CHP systems' thermal charges and facilities fees?

HREA Response: No

b. If the answer to part a. above is no, please explain in detail why these revenues were not included the analysis.

HREA Response: Without discussing the details with the Companies, HREA assumed that the thermal charges and facilities fees would cover the Companies costs to provide hot water or air conditioning to the user from the waste heat recovered from the prime mover. As HREA was seeking to analyze the costs of electricity provided by the utility versus a third party, these non-electricity revenues did not appear to relevant.

c. How does HREA's analysis capture the benefits of deferring central-station generation costs?

HREA Response: It does not.

d. For lines 21-23, why does HREA calculate utility profit based on a mortgage-type payment that includes principal and interest components.

HREA Response: As noted in Mr. Bollmeier's testimony, he was seeking a straight-forward approach to estimate the impacts of rate-basing utility investments. The Companies are free to suggest a different approach.

e. For lines 21-23, how does HREA take into consideration the capital structure of the utility which is approximately 50% debt and 50% equity? Doesn't calculating utility profit on top of a mortgage-type payment overstate the "cost recovery" because a weighted average cost of capital was not used in the calculation?

HREA Response: HREA did not consider the capital structure of the utility in its analysis.

HECO/HREA-RT-RIR-10 Ref: HREA-RT-1, page 9, lines 16-20
Please provide a copy of the Louisiana Public Service Commission decision discussed. Alternatively, for the Louisiana Public Service Commission decision referenced, in accordance with the prehearing order, please provide the file or docket number, decision and/or order number, and the name of the case/matter.

HREA Response: The Louisiana Public Service Commission is attached as Exhibit A.

HECO/HREA-RT-RIR-11 Ref: HREA-RT-1, page 10, lines 19-21
Please provide a copy of the Pennsylvania Public Utility Commission decision discussed. Alternatively, for the Pennsylvania Public Utility Commission decision referenced, in accordance with the prehearing order, please provide the file or docket number, decision and/or order number, and the name of the case/matter.

HREA Response: The Pennsylvania Public Utility Commission is attached as Exhibit B.

END OF HREA'S RESPONSE TO RIRs FROM THE COMPANIES

DATED: November 22, 2004, Honolulu, Hawaii

President, HREA

EXHIBIT A

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-24037

RS COGEN, LLC, PPG INDUSTRIES, INC. AND ENTERGY POWER R.S. CORPORATION, EX PARTE

Docket No. U-24037 - In re:Joint Petition for Declaratory Order or Judgment for Determination of Status.

(Decided at the April 21, 1999 Open Session)

SUMMARY:

On March 26, 1999, RS Cogen, L.L.C. ("RS Cogen"), PPG Industries, Inc. ("PPG") and Entergy Power R.S. Corporation ("Entergy Power") (collectively the "Petitioners") filed a Joint Petition for Declaratory Order ("Petition") requesting this Commission to declare that the financing, construction, ownership, operation and maintenance and power and steam transfers, as described in the Petition, of a proposed cogeneration project at PPG's manufacturing facility near Lake Charles, Louisiana (the "Project") will not render RS Cogen, PPG, Entergy Power, and the Project, either individually or collectively, an electric public utility as defined in La. R.S. 45:121, La. R.S. 45:1161 or La. R.S. 45:1164, or otherwise subject Petitioners or the Project to regulation as an electric public utility by the Commission pursuant to any other relevant state statute, or LPSC rule, regulation or practice. Petitioners have requested expedited treatment in order to allow them to obtain necessary equipment on a timely basis and to achieve certain financing opportunities.

Notice of the Petition was published in the Commission's Official Bulletin #667, dated April 2, 1999, with notices of intervention or protest due on or before April 12, 1999. A late intervention and protest was filed by Dynegy, Inc. on April 13, 1999 and dismissed as untimely. No other interventions or protests were filed.

After a thorough review of the issues presented, the Commission finds RS Cogen, PPG, Entergy Power, and the Project, will not, either individually or collectively, be classified as an electric public utility as defined in La. R.S. 45:121, La. R.S. 45:1161 or La. R.S. 45:1164, or otherwise be subject to regulation as an electric public utility by the Commission pursuant to any other relevant state statute, or LPSC rule, regulation or practice, based upon the facts set forth in the Petition.

DISCUSSION:

A. The Project:

The Project will be a combined cycle cogeneration power project developed jointly by PPG and Entergy Power [1](jointly the "Sponsors") and located at PPG's chlor-alkali plant in Lake Charles, Louisiana (the "Plant"). The Project will have a net output of approximately 400 MW of electrical power and 1,000 klb/hr of useful process steam. The generation capacity will be controlled by the Sponsors in proportion to their fifty/fifty ("50/50") ownership interest in RS Cogen, direct owner of

[1]Entergy Power is a non-regulated subsidiary of Entergy Corporation ("Etr"), a "holding company" under the Public Utility Holding Company Act, 15 U.S.C. §796. Etr is the parent of Entergy Gulf States, Inc. ("EGS") which is an "electric public utility" as defined under Louisiana law, La. R.S. 45:121, La. R.S. 45:1161 and La. R.S. 45:1164. EGS is the incumbent electric public utility which currently provides electrical service in the area surrounding the Project site. While Entergy Power and EGS are affiliated entities, Entergy Power's non-regulated power development activities are independent of, and segregated from, the regulated activities performed by EGS.

the Project. Petitioners will apply for, operate, and maintain status of the Project as a "Qualifying Facility" under the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. §796, and the regulations of the Federal Energy Regulatory Commission ("FERC"), 18 C.F.R. §292.101 and 18 C. F. R. §292.203. As an integrated part of the qualifying facility, PPG will contract with EGS for standby and maintenance power. The Project also will comply with all federal and state environmental requirements.

The Sponsors will bear all of the financial and business risks associated with Project financing, construction, ownership and operation and maintenance activities. Specifically, no Louisiana utility, ratepayer or group of ratepayers will become obligated for any of the costs of the financing, construction, ownership and operation and maintenance of the Project. Further, Petitioners will not furnish retail electric service to the public or all persons requiring such service.

All of the Project's capacity will be dedicated to two (2) power purchasers in direct proportion to the Sponsors' respective ownership interests in RS Cogen. RS Cogen will execute an agreement with PPG allocating fifty percent (50%) of the electric capacity of the Project to PPG. The electricity generated from PPG's capacity will be used at PPG's Plant or sold in the wholesale power market. PPG's capacity entitlement will be commensurate with PPG's ownership interest in the Project. PPG will be committed to pay for its capacity on a demand charge basis, consistent with the costs resulting from PPG's capacity entitlement.

RS Cogen will execute another agreement with Entergy Power Marketing Corporation ("EPMC") allocating the remaining fifty percent (50%) of the electric capacity of the Project to EPMC.[2] The electricity generated from EPMC's capacity will be solely for the purpose of resale into the wholesale power market. EPMC's capacity entitlement will be commensurate with Entergy Power's ownership interest in the Project. EPMC will be committed to pay for its capacity on a demand charge basis where the fixed charge mirrors PPG's fixed charge obligation and the variable charges are consistent with the variable costs resulting from EPMC's capacity entitlement.

Steam produced from the Project will be sold by RS Cogen to PPG and possibly a third party for use as process steam pursuant to PURPA requirements.

B. Status as an Electric Public Utility under Louisiana law:

Under La. R.S. 45:121, La. R.S. 45:1161 and La. R.S. 45:1164, an "electric public utility" is defined as any person furnishing electric service within the State of Louisiana; provided, however, that it does not include any person owning, leasing and/or operating an electric generation facility provided such person is not primarily engaged in the generation, transmission, distribution, and/or sale of electricity, and provided such person consumes all of the electric power and energy generated by the facility for its own use at the site of generation, only consumes a portion thereof and sells the entire remaining portion of the electric power and energy generated by the facility to an electric public utility or sells the entire production of electric power and energy generated by the facility to an electric public utility.

According to Petitioners, they will not furnish retail electric service to the public or all persons requiring such service. Rather, the electric power generated by the Project will either be consumed by PPG or sold into the wholesale market. Further, RS Cogen will have no captive customers or jurisdictional assets and there will be no risk borne by other utilities or ratepayers in the financing, construction, ownership or operation and maintenance of the Project. Under the above circumstances, and pursuant to our review of the characteristics of the entities and transactions involved, the Commission finds that Petitioners should not be considered as providing electric utility service to the public such that Petitioners would be subject to the jurisdiction of the LPSC.[3]

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[2]EPMC is a FERC - licensed wholesale power marketer and affiliate of Entergy Power.

[3]See Cajun Elec. Power Co-op. v. Louisiana Public Service Commission, 256 La. 656, 237 So. 2d 672 (1970); Gulf States Utilities Co. v. Louisiana Public Service Commission, 222 La. 132, 62 So. 2d 250 (1952) (finding that an investigation into the characteristics of a business is

The Commission further finds that Petitioners fall within the exception to the definition of "electric public utility" provided in La. R.S. 45:121, La. R.S. 45:1161 and La. R.S. 45:1164. As a direct owner of the cogeneration facility, RS Cogen falls within the category of a person owning, leasing and/or operating an electric generation facility. PPG owns a fifty percent (50%) equity interest in RS Cogen and is an indirect owner of the Project. PPG will also be contracted to serve as the operator of the Project. Thus, PPG also is a person owning, leasing and/or operating an electric generation facility. Entergy Power owns the remaining fifty percent (50%) equity interest in RS Cogen and is an indirect owner of the Project. Thus, like RS Cogen and PPG, the Commission finds that Entergy Power falls within the category of a person owning, leasing and/or operating an electric generation facility.

The Commission further finds that RS Cogen is not "primarily engaged" in the generation, transmission, distribution and/or sale of electricity. For purposes of this ownership restriction, RS Cogen would be considered primarily engaged in the generation, transmission, distribution and/or sale of electricity if more than 50 percent of the equity interest in RS Cogen is held by an electric utility or an electric utility holding company, or any combination thereof.[4] Entergy Power, although a subsidiary of Etr, a "holding company" under the Public Utility Holding Company Act, owns no more than fifty percent (50%) of the equity interest in RS Cogen and cannot own in excess of 50% of the equity interest under Section 101(b)(1) of LPSC General Order dated February 27, 1998 and 18 C.F.R. § 292.206(b). Thus, RS Cogen satisfies the ownership restriction set forth in La. R.S. 45:121, La. R.S. 45:1161 or La. R.S. 45:1164 as long as the 50% limitation on equity interest is met.

The electric power produced from PPG's fifty percent (50%) capacity will be consumed by PPG or sold into the wholesale market. The Commission finds that as long as PPG's capacity entitlement equals PPG's ownership interest in the Project, there is no sale of electric power to PPG. In accordance with La. R.S. 45:121, La. R.S. 45:1161 or La. R.S. 45:1164, PPG, as owner and/or operator of the facility, will be consuming for its own use the electric power and energy produced from its fifty percent (50%) capacity. The Commission further finds that any wholesale sales by PPG of power generated from PPG's fifty percent (50%) capacity will constitute sales by a qualifying cogeneration facility of electric energy at wholesale. Wholesale sales in interstate commerce made by PPG, as a qualifying cogeneration facility, would not be subject to the Commission's jurisdiction, but would fall under the jurisdiction of FERC. 16 U.S.C. § 824(b). Congress directed FERC to prescribe regulations governing the purchases and sales of electric energy by qualifying facilities. 16 U.S.C. § 824a-3(a)-(c). However, Congress gave states the responsibility to implement FERC's prescribed regulations. 16 U.S.C. § 824a-3(f)(1). As prescribed under Section 210 of PURPA, the LPSC's issued General Order dated February 27, 1998 implementing regulations governing the purchases and sales of electricity between qualifying cogeneration facilities and electric utilities. 16 U.S.C. § 824a-3(f)(1). Therefore, those sales of electric energy at wholesale by PPG, as a qualifying cogeneration facility, to an electric utility over which the LPSC has ratemaking authority would be subject to the Commission's General Order dated February 27, 1998. Nevertheless, wholesale sales of electric energy by PPG, as an integrated part of the qualifying cogeneration facility, to an LPSC-jurisdictional electric utility would not subject PPG to regulation as an electric public utility under state law. 18 C.F.R. § 292.602(c); Section 401(a) of LPSC General Order dated February 27, 1998.

Commensurate with Entergy Power's ownership interest, the remaining fifty percent (50%) of the electric capacity of the Project will be transferred to EPMC (an affiliate of Entergy Power) for resale in the wholesale power market. As with PPG's wholesale sales of power, RS Cogen's transfer of fifty percent (50%) of the electric capacity of the Project to EPMC will constitute a sale by a

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essential to determine whether a particular business is or has become a public utility).

[4]See Section 101(b)(1) of LPSC General Order dated February 27, 1998 (implementing regulations governing the purchases and sales of electricity between electric utilities and qualifying facilities as prescribed by Section 210 of PURPA) and 18 C.F.R. § 292.206(b) (defining the term "primarily engaged" for purposes of Subpart B of FERC's regulations under Sections 201 and 210 of PURPA).

qualifying cogeneration facility of electric energy at wholesale and will not subject RS Cogen to regulation as an electric public utility under state law.

Finally, RS Cogen will sell the process steam generated by the Project to PPG and possibly third parties. The Commission has not historically regulated the production and/or sale of steam and does not intend to change that policy now. Thus, the Commission finds that the sale of steam will not subject RS Cogen to regulation as an electric public utility.

CONCLUSION:

In light of the Staff's review and recommendation, the lack of any timely interventions and the specific request of the Petitioners regarding equipment and financing concerns, we find that expedited treatment of this filing is appropriate.

Considering the above, the Commission finds that RS Cogen, PPG, Entergy Power and the Project will not, either individually or collectively, be considered an electric public utility as defined in La. R.S. 45:121, La. R.S. 45:1161 or La. R.S. 45:1164, or otherwise be subject to regulation as an electric public utility by the Commission pursuant to any other relevant state statute, or LPSC rule, regulation or practice. The Commission's finding is based upon, and limited to, the facts and circumstances as set forth by RS Cogen, PPG and Entergy Power in their Petition, including, but not limited to the requirement that PPG's capacity entitlement must remain equal to its ownership interest in RS Cogen and Entergy Power's ownership interest in RS Cogen cannot exceed 50%.

This Order is limited to existing law as of the date hereof.

On motion of Commissioner Sittig, seconded by Commissioner Blossman, and unanimously adopted, the Commission voted to adopt the staff recommendation,

IT IS THEREFORE ORDERED:

1. That the financing, construction, ownership, operation and maintenance and power and steam transfers, as described by RS Cogen, PPG and Entergy Power in their Joint Petition for Declaratory Order, of a proposed cogeneration project at PPG's manufacturing facility near Lake Charles, Louisiana will not render RS Cogen, PPG, Entergy Power, and the Project, either individually or collectively, an electric public utility as defined in La. R.S. 45:121, La. R.S. 45:1161 or La. R.S. 45:1164, or otherwise subject RS Cogen, PPG, Entergy Power and the Project, either individually or collectively, to regulation as an electric public utility by the Commission pursuant to any other relevant state statute, or LPSC rule, regulation or practice.

2. The Commission's order is based upon, and limited to, the facts and circumstances as set forth by RS Cogen, PPG and Entergy Power in their Petition, including, but not limited to the requirement that PPG's capacity entitlement must remain equal to its ownership interest in RS Cogen and Entergy Power's ownership interest in RS Cogen cannot exceed 50%.

3. This Order is conditioned upon the facility retaining its status as a Qualifying Facility.

4. Any sales of electricity by RS Cogen, PPG or Entergy Power must be to an electric public utility as defined by La. R. S. 45:121, or wholesale sales subject to FERC jurisdiction.

5. This Order does not affect any Commission regulation over RS Cogen or PPG as a customer of or supplier to Entergy Gulf States, Inc., including but not limited to any right by RS Cogen or PPG to sell excess energy to EGSI pursuant to PURPA, nor does it affect Commission avoided cost regulations.

6. This Order does not affect any regulatory authority the Commission may have or exercise over the sale of electricity by or to RS Cogen, PPG, Entergy Power or any other entity at retail, in the event retail competition is approved in Louisiana.

7. This Order is effective immediately.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
April 21, 1999

DISTRICT IV
CHAIRMAN C. DALE SITTIG

DISTRICT I
VICE CHAIRMAN JACK "JAY" A. BLOSSMAN, JR.

DISTRICT V
COMMISSIONER DON OWEN

DISTRICT III
COMMISSIONER IRMA MUSE DIXON

DISTRICT II
COMMISSIONER JAMES M. FIELD

SECRETARY
LAWRENCE C. ST. BLANC

EXHIBIT B

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held September 3, 1998

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
David W. Rolka
Nora Mead Brownell
Aaron Wilson, Jr.

PEI Power Corporation; Petition for a Declaratory Order

Docket No. P-00981405

ORDER

BY THE COMMISSION:

Before the Commission for disposition is a Petition for Declaratory Order filed by PEI Power Corporation ("PEI Power") asking the Commission to conclude that the provision of electric and steam services by PEI Power to property owners and tenants of land located in an industrial park does not constitute the provision of public utility service as defined by 66 Pa. C.S. § 102. PEI Power alleges that clarification is needed as to whether it would be viewed as a regulated public utility under section 102 of the Code, 66 Pa. C.S. § 102, if it were to provide electric and steam services to prospective tenants and property owners within a confined geographic region. Thus, PEI Power asserts that a declaratory order is necessary so as to remove the uncertainty regarding their proposed provision of service. Pursuant to Section 331(f), 66 Pa. C.S. §331(f), the issuance of a declaratory order is a matter within the Commission's discretion; therefore, in order to

remove the uncertainty associated with PEI Power's proposed provision of service, we are entertaining this petition.

History of the Proceedings

On July 1, 1998, PEI Power filed a Petition for Declaratory Order, pursuant to Section 331(f) of the Public Utility Code, 66 Pa. C.S. § 331(f), and Section 5.42 of the Commission's Rules and Regulations, 52 Pa. Code § 5.42. By this Petition, PEI Power asks the Commission to remove uncertainty about whether the electric and steam services that PEI Power proposes to provide to property owners and tenants leasing property within their industrial park ("PEI Power Park"), would be subject to the Commission's jurisdiction under 66 Pa. C.S. § 102. Pursuant to 52 Pa. Code 5.42(b), copies of PEI Power's petition were served upon the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission's Office of Trial Staff ("OTS"), Archbald Borough, and PP&L. In addition, notice of the petition was published on July 18, 1998 at 28 Pa. Bulletin 3482 with a ten-day comment period.

On July 23, 1998, PP&L filed an answer addressing PEI Power's Petition for a Declaratory Order. PP&L argued that PEI Power's petition should be denied and the proposed service should be considered public utility service. The County of Lackawanna Pennsylvania ("County Association") filed an answer on July 24, 1998 in support of PEI Power's request for a declaratory order. In addition, both the Honorable Edward G. Staback ("Rep. Staback"), and the Greater Scranton Chamber of Commerce ("Chamber of Commerce") filed answers to the petition on July 27, 1998, requesting the Commission to

approve PEI Power's petition. Lastly, the Borough of Archbald submitted an answer on July 24, 1998, supporting the issuance of a declaratory order concluding that PEI Power's proposed service is not within the Commission's jurisdiction.

In its petition, PEI Power provides some background information about the industrial park. In 1988, Archbald Power Company commenced operation of a 25 MW anthracite culm burning cogeneration facility and a related Greenhouse Facility in Archbald, Lackawanna County, Pennsylvania. In July of 1997, the Archbald Power Plant and related Greenhouse Facility were sold to a private owner for the purpose of the demolition of the power plant and the covering of the coal ash residue spoil piles. This buyout resulted in the loss of fifty jobs at the plant. In November of 1997, PEI Power purchased the Archbald Power Plant and Greenhouse Facility with the objective of expanding the facility into a waste-sourced methane gas fired facility and named it PEI Power Park.

Allegations In Petition

PEI Power asserts in its petition that its customer base would consist of large, sophisticated industrial and commercial businesses owning or leasing property in the industrial park. PEI Power specifically alleges that its services would be provided through systems designed and constructed to serve only these specific individuals or entities owning or leasing property within the newly revitalized industrial park, and therefore, its system fits within the "designed, constructed and utilized exception" to the Commission's jurisdiction. Moreover, PEI Power asserts that service would not be offered to the general

public because no one beyond the park's geographical limits w. ld be able to demand service but service would be confined only to a privileged and limited group of industrial and commercial customers situated within the industrial park. PEI Power also asserts that no residential class of customers will be located within the industrial park or provided service. Based upon these facts, PEI Power contends that its proposed service is private in nature and that therefore, it is not providing public utility service subject to the Commission's jurisdiction.

Additionally, PEI Power asserts that resuming the production of electrical and steam energy at the industrial park will result in the revitalization of the site, restoration of economic vitality in the Northeastern Pennsylvania region, and numerous other economic and environmental benefits. PEI Power asserts that its customers would contribute to the economic revitalization of the local community by creating jobs and providing a viable tax base. Finally, PEI Power claims that regulation of its services by the Commission would result in additional costs which would unduly complicate PEI Power's reindustrialization efforts, impacting its decision on whether to proceed with the project.

PP&L's Answer

In its answer to PEI Power's petition, PP&L notes PEI Power's acknowledgment that some potential occupants, due to circumstances regarding financing, may choose to purchase land in the industrial park from PEI Power, becoming fee owners, rather than leasing the land and becoming tenants of PEI Power. PP&L argues that service to the landowners situated within the industrial park would be "public utility service" because

PEI Power would have no "control" over those landowners. Additionally, PP&L asserts that PEI Power's facilities do not fall within the "designed, constructed, and utilized" exception to Commission jurisdiction. Specifically, PP&L explains that PEI Power will make its facilities available to any business entity that is desirous of being served by PEI Power, and even expand them if necessary. PP&L argues that the exemption to Commission jurisdiction was created specifically for those systems designed and sized to serve only a definite number of customers which gave the systems a private, as opposed to a public character.

PEI Power's Reply

In response to PP&L's answer, PEI Power avers that in the contractual agreement which the potential tenants of the industrial park will execute, there will be a provision that restricts the ability of the tenants to sub-lease or sell their premises to another commercial or industrial business. Additionally, as to any concerns the Commission might have about service to the landowners situated in the park, PEI Power proposes two options that would give it more "control" over the potential landowners in the park: (1) retain ownership of the real estate and lease it for development by the customer (a traditional lessee-lessor relationship); or (2) transfer the real estate to the customer, but insert restrictive covenants in the power sales and real estate documents which would provide that (a) the purchaser must be a substantial energy user; (b) the purchaser's facilities use must be consistent with the industrial park; and (c) the transfer of the property to the purchaser (or operation by same) would not cause PEI Power to become a public utility.

PEI Power stresses that both of these options must be made available because some customers, for business reasons, may need to own the land within the industrial park (e.g., to obtain PIDA funding). Although PEI Power indicates that it will initially seek to lease the land in the park to potential customers, it urges the Commission to consider the "restrictive covenant" option as a means of ensuring that PEI Power has sufficient "control" over the potential landowners they will serve. Thus, PEI Power urges the Commission to reject the argument raised by PP&L in its answer and to conclude that its proposed service to the potential occupants of the industrial park is private in nature.

Discussion

The issue raised by the Petition for Declaratory Order is whether PEI Power's proposed provision of utility service to tenants and property owners within a defined geographic region constitutes public utility service subject to the Commission's jurisdiction.

Section 102 of the Public Utility Code ("Code"), 66 Pa. C.S. § 102, defines "public utilities" as including "person or corporations. . .owning or operating in this Commonwealth equipment or facilities for: (a) producing, generating, transmitting, distributing, or furnishing. . . electricity, or steam . . . to or for the public. . ." The crucial question we must address is whether PEI Power would be providing services "to for the public" under Section 102.

What constitutes service "to or for the public" has not been defined by statute, but has been the subject of several appellate decisions. Specifically, the courts have concluded

that the public or private character of the service depends upon whether or not it is open to the use and service of all members of the public who may require it or just to a special class of persons. See, Borough of Ambridge v .P.S.C., 165 A. 47 (Pa. Super. 1933); Aronimink Transp. Co. v. P.S.C., 170 A. 375 (Pa. Super. 1934). A common thread among the early decisions holding that the service was not "public" was the determination by the courts that the service was restricted or confined to "privileged individuals" and not open to the indefinite public.

The leading case on what constitutes a "defined, limited and privileged group" is Drexelbrook Associates v. Pa. PUC, 212 A.2d 237 (Pa. 1965) in which the Supreme Court held that the provision of gas, electric and water service by a landlord to the residents of a 1223-unit apartment complex, as well as associated facilities including nine stores, was private in nature and did not constitute public utility service. The reasoning of the Court in Drexelbrook was based on the fact that service was limited to a special class of persons constituting a "defined, privileged and limited group." The common characteristic shared by the customers of the apartment complex which made them a special class, outside of the provider-customer relationship, was that they were all within a landlord-tenant relationship. Through this relationship, the apartment complex was able to control those to whom it would offer service and could limit those who were privileged to demand service to those only in this special class. The court in Drexelbrook saw this landlord-tenant relationship as a means by which the apartment complex was able to define its customer base. Thus, based on the Drexelbrook decision, the test for whether the character of the service is

public or private depends upon whether anyone outside of the special class, which the service provider has the ability to control and restrict to a defined group, is privileged to demand service.

Based upon the Drexelbrook case, the existence of a relationship which gives the service provider the ability to restrict those who can demand service to a special class is vital to the consideration of whether the service is public or private. Thus, it is critical in this case to consider whether PEI Power will have control over the potential occupants of the industrial park so as to be able to restrict them to a "defined, privileged and limited group."

In its petition, PEI Power notes that in order to receive service, potential occupants will have to execute a contract with PEI Power. Additionally, PEI Power asserts that it will confine its service to only those located within the industrial park and that no one outside of this geographic region would be privileged to demand service. Moreover, PEI Power indicates that it will not serve any residential customers, but will only provide service to a limited group of industrial and commercial customers. PEI Power claims through taking these measures, it will be able to select precisely to whom it will offer electric and/or steam service. Thus, PEI Power believes that it should be viewed as offering service to a defined, privileged and limited group and not to the public at large.

PP&L, in its answer to the petition, observes that PEI Power would be offering service to both landowners and tenants. PP&L argues that this fact alone restricts PEI Power's ability to ultimately select and limit who is able to demand service. PP&L

suggests that the important issue that needs to be addressed in this case is whether PEI Power would be able to restrict the potential landowners receiving service in the park from eventually selling their land to other commercial businesses. If not, PP&L notes that PEI Power's proposed service would be actually service to an open class and would be "public" in nature. In support of this argument, PP&L cites the case of Warwick Water Works, Inc. v. Pa. P.U.C., 699 A.2d 770 (Pa. Cmwlth. 1997).

In Warwick, the Commonwealth Court held that the service provider was a public utility under the Commission's jurisdiction even though it provided water service only to its tenants and to a limited number of property owners in a condominium association. In that case, the court determined that, unlike the situation in Drexelbrook, Warwick had no control over the residents in the condominium association, who could sell their land to new owners without Warwick's permission. The court concluded that since no relationship, other than service provider and customer, existed between Warwick and the customers in the association which would have allowed Warwick to control and restrict those who were able to demand service, the service was available to an open class and public in nature. See generally, Re Megargel's Golf, Inc., 59 Pa. P.U.C. 517 (1985).

We agree with PP&L's argument that PEI Power would not have any control over the landowners to whom it would be providing service. Hence, we are not satisfied that the proposed service would be private in nature. Restricting service to a particular geographic region and limiting service to only a definite number of customers is not enough for a service provider to be exempt from Commission jurisdiction. The Commission has

previously concluded that the term, "defined, privileged and limited group," does not mean persons in a particular geographic region, no matter how small. Re Megargel's Golf, Inc., 59 Pa. P.U.C. 517, 521 (1985). Moreover, the public or private nature of the service is not dependent upon the number of persons served, Waltman v. Public Utility Service, 596 A.2d 1221 (Pa. Cmwlth. 1991), nor upon the class of customers served (commercial and industrial as opposed to residential).

Additionally, we do not believe that PEI Power's proposed service falls within the "designed, constructed, and utilized exception" to Commission jurisdiction. Borough of Ambridge v. P.S.C. 165 A. 47 (Pa. Super. 1933). Although PEI Power's facilities may be intended to serve only specific entities, they are not designed or constructed to serve a select type of business which is an important element of this exemption. Rather, PEI Power indicates that its service would be for any business who believes that the package is right for them, can use their services and chooses to execute a contract with PEI Power. Furthermore, PEI Power's facilities will not be constructed or sized to serve a definite number of customers, but could be expanded to serve an additional customer that desired to be served. Cf., Re Hazleton Associates Fluidized Energy, Inc., 62 Pa. P.U.C. 619 (1986). Thus, in light of such factors, it is clear that PEI Power's proposed service is to a limited portion of the public and does not meet the designed, constructed, and utilized exception to Commission jurisdiction.

However, PEI Power, in its reply to PP&L's answer, set forth a proposal to include restrictive covenants in its contracts with landowners, and based upon this, we believe that

PEI Power would have sufficient control over the landowners. Although PEI Power would be offering service to some tenants and to some property owners, an important factor distinguishes this case from Warwick. Specifically, PEI Power owns the land[1] and has the ability to place restrictive covenants within the contractual agreements, giving PEI Power sufficient control over any potential occupant that is a landowner. The restrictive covenants will prohibit the existing landowner from selling to anyone without PEI Power's approval. Absent the inclusion of restrictive covenants in the contracts with landowners, PEI Power would not have this control. In our view, the imposition of the restrictive covenants in the contract will give PEI Power the requisite control to restrict its customers, even the landowners, to a defined, limited and privileged group. Thus, the service that PEI Power proposes to provide to the potential occupants in the industrial park, would be offered only to a defined, limited and privileged group and would be private in nature.

Conclusion

In conclusion, PEI Power's proposal to place restrictive covenants in the landowners' contracts would give it the ability to confine its service to a limited and privileged few and under those circumstances, we believe that PEI Power would be providing utility service which is private in nature and would not be subject to the Commission's jurisdiction; **THEREFORE,**

[1] In Re Megargel's Golf, Inc., 59 Pa. P.U.C. 517, 521 (1985), the Court focused on the fact that neither Megargel nor the new owner had control over the persons who would their customers since they did not own the homes or cottages or *even the land* on which the homes and cottages were situated. (emphasis added).

IT IS ORDERED.

1. That the Petition for Declaratory Order of PEI Power Corporation be granted consistent with the discussion contained in the body of this order.

2. That if PEI Power Corporation places the appropriate restrictive covenants in its contracts with the landowners situated within the industrial park, PEI Power Park, the provision of electric and steam services by PEI Power to them would then constitute service that is private in nature, and hence, PEI Power would not be providing public utility service under Section 102 of the Code subject to Commission jurisdiction.

3. That absent the restrictive covenants described in Ordering Paragraph No. 2 above, PEI Power's proposed service would constitute public utility service subject to Commission jurisdiction.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: September 3, 1998

ORDER ENTERED: SEP 0 3 1998

CERTIFICATE OF SERVICE

I hereby certify I have this day served the foregoing "Response to IRs from HECO/ HELCO/MECO" upon the following parties by causing a copy hereof to be hand-delivered or mailed, postage prepaid, and properly addressed the number of copies noted below to each such party:

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Dated: November 22, 2004

President, HREA